

PRACTICES AND PROCEDURES OF MAGISTRATE JUDGE KEITH A. PESTO

I. GENERAL MATTERS¹

A. Communications with the Court

Magistrate Judge Pesto permits correspondence with the court as to all matters.

B. Communications with Law Clerks

As a part-time Magistrate Judge, Magistrate Judge Pesto does not have a law clerk. Counsel may inquire as to the status of pending motions through his courtroom deputy/secretary.

C. Telephone Conferences

Some or all attorneys may participate in any conferences by telephone as long as the arrangements are satisfactory to all attorneys involved. If attorneys can't agree, then all attorneys have to appear in person or all must participate by telephone. Magistrate Judge Pesto will permit parties to participate by telephone only on rare occasions---e.g. for settlement purposes.

D. Pro Hac Vice Admissions

Magistrate Judge Pesto follows Local Rule 83.5 as to pro hac vice admissions.

E. Comment to the Media

Magistrate Judge Pesto does not have a policy placing any restrictions on counsels' comments to the media.

II. MOTIONS PRACTICE

A. Oral Argument

Magistrate Judge Pesto will, upon request, hold oral argument on any type of pending motion but prefers not to. He will most often grant requests for oral argument on summary judgment motions. Counsel may request oral argument by letter or telephone to his secretary/courtroom deputy. Magistrate Judge Pesto generally tries to schedule argument at counsel's convenience, but does not hold argument while trial is in session.

B. Briefs

Magistrate Judge Pesto requires briefs to be filed in support of motions unless the action requested is ministerial (e.g. motion to extend time or to compel when there has been a total failure to respond). Counsel may file briefs even though not required. Reply and surreply briefs are not permitted. The Magistrate Judge has no page restrictions, but expects counsel not to overburden the court.

¹Note: Magistrate Judges' duties in the Western District are governed by LR 72.1

C. **Chambers Copies of Motion Papers**

Magistrate Judge Pesto does not require courtesy copies of motions papers and prefers not to receive them.

D. **Scheduling**

Magistrate Judge Pesto's general practice is to require that briefs in support be filed with the motion. Responsive briefs on motions to dismiss or for summary judgment must be filed 20 days thereafter; responsive briefs on discovery-type motions should be filed within 5 days. See Standard Case Management Order, attached as Exhibit A.

If a motion does not fall into one of the standard categories, Magistrate Judge Pesto will issue a special scheduling order.

E. **Magistrate Judge's Report and Recommendation**

N/A

F. **Evidentiary Hearings**

Magistrate Judge Pesto schedules evidentiary hearings on pretrial motions for a date separate from the trial date.

G. **In Limine Motions**

Magistrate Judge Pesto prefers that in limine motions be presented prior to trial. He will attempt to rule on them immediately after hearing, provided that the issue can be framed at that time.

III. **CIVIL CASES**

A. **Pretrial Procedures**

1. **Local Rule 16.1.4**

Magistrate Judge Pesto issues a standard pretrial order (see Exhibit III.A.1., attached). He follows Local Rule 16.1.4.

2. **Pretrial Conferences**

Magistrate Judge Pesto will conduct conferences in addition to those specified in LR 16.1.1 and 16.1.3 if counsel so requests. He does not use any particular benchmarks, but asks that counsel keep him informed, by telephone or otherwise, if there are problems.

3. **Settlement**

Magistrate Judge Pesto does not have any settlement discussion requirements other than those set out in LR 16.1.4 E.4.

In non-jury cases, Magistrate Judge Pesto will refer settlement negotiations to another magistrate judge ---usually through the Chief Magistrate Judge.

Magistrate Judge Pesto does not usually explore the possibility of ADR, but does let the parties know it's available (e.g. as per LR 16.2). A case would generally be before him for trial if the parties have opted out of the arbitration program and at least one party is not interested in settlement.

4. **Extensions and Continuances**

Magistrate Judge Pesto does not have any special rules regarding requests for, or grants of, extensions or continuances. Generally, a party has to show good cause. Requests for extension of discovery should be filed prior to the date set for the close of discovery.

B. **Discovery Matters**

1. **Length of Discovery Period and Extensions**

Magistrate Judge Pesto's general standard --- except for cases obviously complex at the outset --- is four months for discovery. He will permit extensions upon request, but reads request for extensions as a sign a case may be in trouble and he should take a more active case management role, to be sure discovery is completed by the extension date. He will allow a second extension only in extraordinary circumstances.

2. **Expert Witnesses**

Magistrate Judge Pesto follows Fed. R. Civ. P. 26(b)(4) as to depositions of experts whose opinions may be presented at trial and those who are not expected to be called.

In the event of a Daubert hearing, he will generally allow experts to be deposed in lieu of appearing in person at the hearing.

3. **Deposition Disputes**

Magistrate Judge Pesto will entertain telephone calls from attorneys to resolve discovery disputes. If he is not available, he will return the call. He likes to resolve such problems when they arise, but expects that counsel will not abuse the situation.

4. **Stay of Discovery**

Magistrate Judge Pesto's general policy is that discovery should go forward during the pendency of a dispositive motion. He will otherwise order if reasons to do so are demonstrated.

5. **Limitations on Discovery**

Magistrate Judge Pesto does not, as a general matter, impose any restrictions on the use of discovery procedures. He would do so, however, if he perceived a potential for abuse or trouble or upon motion, for good cause shown.

6. **Rule 11 Motions - Rule 37 Sanctions**

The judge requires briefing of Rule 11 and Rule 37 motions, the moving party's brief to be filed with its motion. He tries to rule on them as quickly as he can. He will order attorneys fees in an appropriate case.

C. **Injunctions and TROs**

Magistrate Judge Pesto, given the extent of his jurisdiction, usually does not handle injunctions or TRO's, although he has conducted evidentiary hearings in aid of such motions. He would order expedited discovery in an appropriate case, but if a matter is that urgent, it will usually not be referred to him.

D. **Trial Procedures***

1. **Scheduling of Cases**

Magistrate Judge Pesto publishes a trial list for each trial term in Johnstown. The list is published about a month before the term starts. He tries to give counsel 48 hours notice that their case will be reached. Counsel can also call his courtroom deputy/secretary for information on the status of cases on the list. The judge will not list a case for trial if a dispositive motion is pending.

Magistrate Judge Pesto's general rule on other obligations of counsel is "first come, first served." He will take particular circumstances of counsel into account, as well as those of the parties and witnesses, to a lesser extent. If for instance, an expert witness is not available, he would expect her testimony to go in by deposition.

2. **Trial Hours/Days**

Unless counsel requests otherwise, for good reason, Magistrate Judge Pesto generally holds trial Monday through Friday from 9 a.m. to 5 p.m. with 1+ hours for lunch. Motion are heard at 8:30 a.m.

3. **Trial Briefs**

Magistrate Judge Pesto permits trial briefs. He has no page or filing date restrictions.

4. **Voir Dire**

Magistrate Judge Pesto conducts voir dire. He will permit counsel to conduct follow-up voir dire and to supplement the court's standard voir dire questions. Proposed questions must be submitted at least one day in advance so that the judge can decide if the questions are permissible.

5. **Notetaking by Jurors**

Magistrate Judge Pesto does not permit notetaking by jurors.

6. **Side Bars**

Magistrate Judge Pesto permits side bars but does not encourage them. He prefers that all such matters be handled when the jury is not in the room. He does not have any special rules concerning sidebars.

7. **Examination of Witnesses Out of Sequence**

Magistrate Judge Pesto will permit the examination of witnesses out of sequence in a party's own case or within the opposing party's case provided there is no argument as to any waiver of the right to move for a directed verdict or judgment as a matter of law.

8. **Opening Statements and Summations**

Magistrate Judge Pesto does not limit the time for openings and closings, but would not let counsel abuse the lack of restriction.

9. **Examination of Witnesses or Argument by More Than One Attorney**

Magistrate Judge Pesto will not permit more than one attorney for a party to examine or cross-examine a single witness. If there are multiple plaintiffs or defendants, one attorney for each party can examine the witness. More than one attorney for a party can conduct trial proceedings in general.

10. **Examination of Witnesses Beyond Direct and Cross**

The judge will permit redirect and recross, but not further examination.

11. **Videotaped Testimony**

Magistrate Judge Pesto has no special procedures as to the use or admission of videotaped testimony. He does require that such testimony be available at least the day before its expected proffer so that he can deal with objections and make any necessary evidentiary rulings.

12. **Reading of Material into the Record**

In non-jury trials, it is not necessary that material be read into the record; counsel can simply submit a listing of line designations or a videotape for deposition testimony and a specification of other material. Where there is a jury trial, counsel or someone they designate can read deposition testimony into the record. The court will read stipulations into the record.

13. **Exhibits**

Magistrate Judge Pesto requires that exhibits and demonstrative evidence be exchanged before trial. He prefers one side to use numbers and the other letters. An exhibit book is nice but not required.

The judge has no special rules on the use of visual aids during trial. He does not

require that exhibits be offered into evidence before testimony is given about them.

14. **Directed Verdict Motions**

Magistrate Judge Pesto has no standard requirements as to directed verdict motions or motions to dismiss in non-jury trials. Motions can be oral or written, partial or full. He will entertain them on briefs or argument only.

15. **Jury Instructions and Verdict Forms**

Magistrate Judge Pesto uses standard jury instructions from Devitt and Blackmar, Pennsylvania Standard Instructions and compilations of the various circuits. Counsel can call his chambers for information about particular instructions.

The judge requires the submission of proposed instructions and verdict forms applicable to a particular case. Instructions on matters such as credibility and pain and suffering do not have to be submitted unless there is a particular form of such an instruction counsel wants to request. The earlier proposed instructions and forms are filed the better; they must be filed by the close of testimony. The judge discusses them with counsel after the close of testimony but before closing arguments.

16. **Proposed Findings of Fact and Conclusions of Law**

Magistrate Judge Pesto would require the submission of proposed findings and conclusions in complex cases. In other cases he will permit them; usually, they should be filed within 10 days after the close of testimony.

17. **Offers of Proof**

Magistrate Judge Pesto requires that offers of proof as to matters that can be anticipated be requested prior to trial. He will not consider or grant requests for offers of proof while the jury is in the box.

18. **General Courtroom Rules**

Magistrate Judge Pesto does not have any special rules concerning the conduct of attorneys during trial. Counsel can question witnesses from anywhere in the courtroom, including from behind counsel table. It is not necessary for counsel to ask if they can approach the witness to show her an exhibit. The judge does not like attorneys to sit at counsel table, then get up to approach the witness and then sit down again and does not approve of attorneys taking the time to request something the judge allows them to do as a matter of course.

E. **Jury Deliberations**

1. **Written Jury Instructions**

Magistrate Judge Pesto always gives the jury a copy of his instructions.

2. **Exhibits in the Jury Room**

Magistrate Judge Pesto generally allows all exhibits to go out with the jury---except for firearms and bullets together---unless counsel can show that to do so would be unduly prejudicial.

3. **Jury Requests to Read Back Testimony or Replay Tapes During Deliberations**

The judge will honor a specific request for reading back or replay if it is meritorious. It is done in the courtroom and the judge expects counsel to be present.

4. **Jury Questions**

If a jury question or request is not completely ministerial, Magistrate Judge Pesto will advise counsel, in person or by telephone, as to what the request is and his proposed response. Counsel can make any objections on the record. The court's response will then be sent into the jury room.

5. **Availability of Counsel During Jury Deliberations**

Magistrate Judge Pesto expects counsel to be either physically present in the courtroom or reachable within a few minutes during jury deliberations. Rooms in the courthouse are available for the use of out-of-town counsel.

6. **Interviewing the Jury**

Magistrate Judge Pesto does not impose any limits on the post-verdict questioning of jurors but advises jury members they do not have to answer questions.

F. **General**

1. **Special Types of Cases**

Magistrate Judge Pesto has a standard scheduling order for social security cases. He requires the filing of a case statement, modeled after the one developed by Judge Bloch, in RICO actions.

2. **Other Individual Practices/Procedures**

Magistrate Judge Pesto has no other individual practices or procedures he would like lawyers practicing before him to know about, except that he always prefers counsel to agree among themselves and minimize the need for his intervention or ruling.

IV. **CRIMINAL CASES**

A. **Motions**

N/A

B. Pretrial Conferences

N/A

C. Guilty Pleas

Magistrate Judge Pesto has no special rules regarding guilty pleas. His jurisdiction is limited to misdemeanors. He does not have any deadlines for accepting or rejecting plea bargains. He does follow a written format with respect to the entry of guilty pleas; a copy is obtainable from the clerk's office.

D. Voir Dire

If the judge had a criminal jury trial, he would conduct voir dire and permit its supplementation as for civil trials. (See Section III, D, 4. above).

E. Trial

N/A

F. Sentencing Memoranda

Magistrate Judge Pesto permits the filing of sentencing memoranda. They should be filed the day before the hearing.

G. Sentencing Conference

The judge does not hold sentencing conferences or issue tentative findings of fact or rulings prior to imposing sentencing. Relevant matters are generally worked out with the probation officer.

H. Other General Practices and Procedures

Magistrate Judge Pesto will make recommendations regarding the institution to which a defendant should be sent if requested by defense counsel.

His policy as to Jencks material is that the earlier it is provided, the better.

The judge does not require a motion for leave to travel if counsel and the probation officer agree to permit a defendant to travel outside the Western District.

Magistrate Judge Pesto has no general policy on the handling of conflicts between a defendant and defense counsel; he decides based on the circumstances of the case before him.